

Power Systems Analysis, Inc. and International Brotherhood of Electrical Workers, Local Union 71. Cases 8-CA-27465 and 8-CA-27776 (Formerly 3-CA-19457)

November 13, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 8, 1996, Administrative Law Judge Michael O. Miller issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings,¹ findings, and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Richard F. Mack, Esq., for the General Counsel.
Richard P. McLaughlin, Esq., for the Respondent.
Patrick Grice, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Canton, Ohio, on February 5 and 6, 1996, based upon charges and amended charges filed on June 8, July 5 and 21, 1995, and complaints and amended complaints issued on October 19 and November 30, 1995. The amended consolidated complaint alleges that Power Systems Analysis, Inc. (PSA, the Company or the Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by terminating and failing and refusing to recall Dallas (Dale) W. Lucore, its employee, because of his union membership and activity. The Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, with an office in Navarre, Ohio, and jobsites in Churchville, New York, and Ord, Nebraska, is engaged in the installation, repair, and maintenance of medium-voltage electrical distribution systems. Annually it derives gross revenues in excess of \$50,000 from services provided to enterprises located outside the State of Ohio. The complaint alleges, Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Brotherhood of Electrical Workers, Local Union 71 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent performs installation, repair, and maintenance work on electrical distribution equipment at sites throughout the United States. It maintains only a small core group of employees, whom it sends to those jobsites, supplementing that work force with employees hired locally. Its work force has never been represented by any labor organization. However, it had used IBEW members on at least one jobsite, securing employees from a local hiring hall without being signatory to any collective-bargaining agreement. It has no history of unlawfully opposing unionization of its work force. Respondent follows seniority in laying employees off at the conclusion of its projects. Respondent's president is Michael Massolini; John Massolini is vice president.

Dallas Lucore is a highly skilled journeyman electrician and longtime IBEW member. His skills include lead cable splicing, terminations, high voltage metering testing, and primary metering pole construction. He had run his own electrical contracting business between the mid 1970s and the mid 1980s. Local 71 is his home local. In mid-February 1995,¹ after unsuccessful efforts to secure employment with union firms through the hiring hall, he responded to Respondent's classified advertisement seeking a salaried construction estimator. He was interviewed by both Michael and John Massolini. Lucore's resume noted his training under union programs and he made known his union membership in the job interview. The Massolinis assured him that it posed no problem for PSA.

Lucore thought he was applying for a position as a construction estimator. However, he was hired as a lineman and immediately dispatched to a 12-day job in Central City, Kentucky, and then a 1-day job in southern Ohio. After that job, he was off for a few days and was then sent to a PSA jobsite in Churchville, New York. His wage rate of \$14 per hour was substantially below the scale of IBEW agreements.

Between the Kentucky and Churchville jobs, Lucore called his union representative, Patrick Grice, essentially to clear his working with the tools of his trade for a nonunion employer. Grice knew of PSA as a testing facility and was surprised to learn that it was engaged in construction work within the Union's jurisdiction. Grice okayed Lucore's continued employment and asked him to find out what he could about

¹ All dates hereinafter are 1995 unless otherwise specified.

the Company, including the nature of its work and the prospects for organizing its employees. Lucore told Grice that at least one of the PSA employees had previously been a union member who might be interested in resuming membership. Grice sent Lucore union authorization cards and literature.

B. The Churchville Job

The Churchville job was staffed with five employees: Juan Ybarra, Dave Duvall, Ray Moyers, Mark Parette, and Lucore. Ybarra, Duvall, and Moyers had been employed by PSA for some years, Parette and Lucore had equal seniority as new employees. The project involved pulling underground cable through 22 manholes and 11 risers. This cable pulling work was done by the entire crew working together; the cable was pulled mechanically. The project also included installing terminations, i.e., crimping and putting ends on high voltage cable to enable it to be plugged into two and three hole circuits. Terminations are generally installed while the workman is in the manhole, with one or two other workers above the hole, preparing and passing materials to the individual in the hole. On the terminations, the men broke into teams of two or three.

When Lucore first arrived at the Churchville site about March 7, the project manager, Kyle Kirkpatrick, was supervising the job. When Kirkpatrick left the site in late March, Lucore and Ybarra participated in a conference call with Michael Massolini wherein Massolini asked Lucore to take over the supervision of the project. Lucore declined, pointing out Ybarra's greater seniority and the project's need for him to do the hands-on work. He agreed to help Ybarra out and keep an eye on the work, reporting back to Massolini as necessary.²

C. Union Activity

Lucore remained in contact with Grice. Grice notified Richard Fulton, organizer for IBEW Local 1249, with jurisdiction over Churchville, of PSA's work in that area and of Lucore's presence on the jobsite. Fulton met with Lucore in mid April. In about early May, he told Lucore that both Locals would notify PSA that Lucore was a union member who would be engaging in organizational activities on the Union's behalf.

Letters were prepared by both Locals. On May 4, the business manager of Local 1249 wrote to PSA at its Navarre, Ohio office informing PSA that Lucore was a member of Local 71 who would be "attempting to organize your company into the International Brotherhood of Electrical Workers." The Local expressed an interest in meeting with PSA to discuss its becoming a signatory contractor. Local 71 sent a similar letter on May 8.

On the morning of May 8, Fulton accompanied Lucore to the jobsite. When Ybarra arrived, Fulton told him that Lucore was a union member who would be engaging in organizational activity. Fulton observed Lucore give some union literature to Parette. Thereafter, Lucore spoke to each of the employees on the job. Some time after May 10, he secured a signed authorization card from Parette. The others declined to sign.

² Ybarra had no recollection of this conversation; Massolini denied it. I credit Lucore, finding Michael Massolini to have been less than candid in his testimony.

Also on the morning of May 8, Grice showed up at PSA's Navarre, Ohio office. Although he had no appointment, the Massolinis made time to meet with him. Grice introduced himself and expressed an interest in having PSA use employees from its hiring halls. Respondent expressed a similar interest in having a source of skilled employees which would permit them to grow. They discussed problems PSA had had in the past when trying to use union labor and Grice apologized for what others may have done. He described the quality and skills of the electricians the Union could provide. In the course of the conversation, Grice mentioned that Respondent had a Local 71 member, Lucore, working on their Churchville jobsite. Michael Massolini expressed surprise³ and said, "Dallas is a good guy . . . I just don't have enough . . . Dallas'. . . Dallas is a good example of [a qualified electrician] . . . knows this business like the back of his hand. I could use more like him . . . he'd do practically anything to help you out, too bad there's only one Dallas."

They continued discussing the qualities of union-referred journeymen. When the sales manager, Gary McClune, asked how the Union felt about its members working for a non-union contractor, Grice told him that there would be a problem if the Company had them working continually. That problem would be eliminated, he said, if PSA became a signatory contractor, and he explained how that would work and what consequences it would have for existing employees. The brothers said that PSA would consider what Grice had suggested and the meeting broke up.⁴

At some point after May 8, Michael Massolini initiated another meeting with Grice for May 26, at the union hall. Prior to that date, Grice called PSA's office several times to verify that they would be meeting; he never got through to any of Respondent's principals. No one from the Company showed up on May 26; Grice had never been notified that Massolini would be unable to attend. Thereafter, Grice's efforts speak with the Massolinis were unsuccessful; his calls were never returned.⁵

On May 10, John Massolini and Gary McClune came on to the Churchville jobsite. According to Michael Massolini, they went there to meet with the project owner and to assess the work because of complaints from the owner about the pace of the work. Lucore observed McClune taking photographs around the site. While there, John Massolini asked Ybarra whether any of the employees had signed union cards. None had by that time and Ybarra so informed him. Ybarra was told that, when the time came, he should let

³ This expression of surprise was not entirely candid; he was aware of Lucore's union affiliation from the initial interview.

⁴ Of the three management representatives at that meeting, only Michael Massolini testified. He claimed not to recall making the flattering remarks about Lucore. However, the foregoing is drawn from the transcription of a recording Grice surreptitiously made of the conversation. Respondent did not dispute the accuracy of that transcription.

⁵ Either there was a failure to effectively communicate or Michael Massolini misspoke when he claimed that he instructed his secretary to notify the Union that he could not attend the meeting. Noting the failure to return Grice's subsequent calls, I believe that it was the latter. While it is true, as Respondent pointed out, that Massolini had no obligation to meet with Grice, his failure to cancel or attend the meeting, and his failure to return Grice's subsequent calls, indicates at least a loss of interest in what Grice had to offer Respondent.

Lucore and Parette go, as they were the least senior men. There is no evidence establishing that Respondent was aware of any interest Parette may have had in the Union at this point in time.⁶ Ybarra told John Massolini that he needed Lucore, that the job's conclusion was a few weeks away and that he needed the manpower.⁷ To Lucore's observation, John Massolini talked to everyone except Parette and him.⁸

D. Lucore's Work and his Termination

Sometime between May 10 and May 19, Ybarra saw that he could finish the job with just three workers. He called Michael Massolini to ask whether he could let Lucore go. Massolini told him to hold off for a few days and to call back later. When Ybarra called again, he was authorized to lay Lucore off. On May 19, Ybarra told Lucore that the Company was losing too much money on the job and that he would have to let him go. As Lucore knew that the job was winding down and was also aware that the Company had lost money on its contract, he accepted the layoff without question.⁹ The Churchville job continued for another few weeks with just Ybarra, Duvall, and Moyers working.

About mid-April, Michael Massolini had asked Lucore if he would go to Ord, Nebraska, for a project they were going to undertake after Churchville. Lucore told Massolini that he would.¹⁰ When Lucore returned to the Employer's office on

May 30, to pick up some money, he asked Michael Massolini, "When are we going to Nebraska?" Massolini told him not to "save it," that he was not needed there and would not be going to Nebraska. Lucore pointed out that Massolini had asked him if he would go to Nebraska when they had spoken on the phone a month earlier. Massolini did not dispute that. Rather, in an abrupt ending to their conversation, he told Lucore:

Well, yeah, you're not going to Nebraska. I don't need you in Nebraska. I got 14,000 people wanting to go to Nebraska. You got your checks, why don't you get out of here? I don't need you in Nebraska. No more work. Over, clear, outa here.¹¹

The Ord, Nebraska project was not Respondent's next project after Churchville. First, after a brief layoff, Ybarra and Duvall worked for a short time in Buford, Georgia. They then went to Ord where they worked either alone or with one other employee, a man who had worked for Respondent on and off for a number of years. The job at Ord involved the setting of poles and the pulling of power lines, work which was within Lucore's classification and which he was capable of doing. Because it was underbid, Ord was another money-losing project for Respondent.

Since May 19, Respondent has never recalled Lucore. However, the record is silent on whether, after Ord, Respondent performed any work calling for employees with his skills or any work which called for more than the few long-term employees it had employed prior to him. Subsequent to his termination, however, it continued to run the same classified advertisement for construction estimators which had attracted Lucore's application. That ad referred to Respondent as an "electrical construction/service company."¹²

Michael Massolini testified that he made the decision to terminate Lucore and inferred¹³ that he did so because Lucore was a slow worker whose pace of work had caused the company to lose money on the Churchville project. He claimed that he had spoken daily with the owner's jobsite representative, who told him that the job was progressing too slowly and that the owner was threatening to seek damages for the delay. He also claimed to have communicated those complaints to Ybarra on a daily basis and that Ybarra had

out of that contract. I credit Lucore, noting his conversation with Michael Massolini on May 30 in which Massolini implicitly acknowledged prior discussions with Lucore concerning his going to that job. The May 30 conversation was recorded and Respondent did not dispute the accuracy of the transcription.

¹¹ On an unspecified date prior to June 9, according to the statement given by Ybarra to a business agent on June 12, Michael Massolini had told him that the Ord project would be staffed by Ybarra, Moyers, Duvall, and Parette. Ybarra did not contend that this portion of that statement was inaccurate.

¹² At the hearing, Michael Massolini stated that Respondent was going to cease bidding on construction work because of his frustrations with the charges and with the losses this work had engendered. This would tend to indicate that it had not ceased bidding on, or performing, construction work by the date of the hearing.

¹³ While Michael Massolini adamantly denied that Lucore's union activity motivated his decision to terminate and not recall Lucore, and testified as to Ybarra's reports concerning Lucore's work and as to the unprofitable nature of the Churchville contract, he never expressly stated that it was Lucore's work tempo which had motivated that decision.

⁶ Contrary to the General Counsel's contention on brief, it was Duvall, not Parette, to whom Grice had referred, on May 8, as having once been an IBEW member. Parette had not signed an authorization card by the time of John Massolini's May 10 visit to the Churchville site.

⁷ On June 12, Ybarra gave a statement to an IBEW Local business manager in North Dakota where he was then working, signing it before a notary. In that statement, he described the May 10 jobsite visit by John Massolini and Gary McClune. (It is clear that the date at the top of the document, May 10, 1995, refers to that visit, not to the date upon which he gave the statement.) He related that John Massolini had asked him how everyone was working out and whether they needed Lucore on the job. He replied that Lucore was needed and was told that, when it came time for layoffs, Lucore should be the first to go. His testimony, set forth above, adds less incriminating nuances to the conversation and asserts that the statement was not entirely accurate. Noting the circumstances of that interview, and the irregular nature of the General Counsel's reliance upon such a statement rather than one taken by a more skilled and impartial Board agent, I am compelled to find his testimony more probative than that statement.

⁸ As noted above, neither John Massolini nor McClune testified here.

⁹ There was, according to Ybarra, about another 2-1/2 weeks of work, including a few more terminations and extensive cleanup. Ybarra believed that Moyers, Duvall and he could do it in that time. This did not include the required testing of the work which Lucore was qualified, and had offered, to do. I accept Respondent's explanation and evidence that it was less costly for it to hire an outside testing firm than to ship its own testing equipment to the site and note that this work had already been contracted out. While Lucore testified that no other employees were let go when he was, it appears from his affidavit and other evidence that Parette had left the jobsite before May 19. In that affidavit, which was read into the record, Lucore stated that, at the time he was laid off, he "was the least senior employee remaining at the site after Parette's departure."

¹⁰ Michael Massolini initially testified that he had no recollection of this discussion. Subsequently he claimed that no such conversation took place. He contended that, by mid-April, he knew that the Ord project would be another money loser and he was trying to get

"stated . . . on numerous occasions that Mr. Lucore was holding up the project due to the fact that he was working too slow." He directed Ybarra to talk with Lucore and to alternate the members of the crews. Michael Massolini also acknowledged, however, that it was Respondent's underbidding of that project (and others) which caused it to lose money.

Ybarra described Lucore's work, particularly on the terminations, as slow and getting slower as the project continued, negatively impacting the work of the other employees. Duvall and Moyers complained to him about Lucore's pace and its effect on their work. Ybarra repeated these complaints to Massolini, he asserted, throughout the period of Lucore's employment on that project, beginning in mid-March. However, he "just mentioned" this to Lucore "once or twice," making "no big issue" of it. Ybarra claimed that, in Lucore's last week of work, he shifted Lucore around to work with other employees as a way of increasing his productivity.¹⁴ Both Ybarra and Moyers also noted that Lucore, as the oldest employee, frequently commented that he was getting too old for this work.¹⁵ Moyers also complained to Michael Massolini that Lucore and Parette were causing the termination work to go too slowly.

Lucore claimed that he received no adverse criticism of his work and was never directly told that he was slowing up the project. He thought that his work was no slower than that of the others but believed that he was more thorough than they were. He acknowledged having heard rumors to the effect that Ybarra, Moyers, and Duvall had said that he was responsible for delays in the Churchville project. Ybarra confirmed that Lucore was very skilled and that, in the initial weeks of the project, had showed the others some quicker ways to work.

E. Analysis

Wright Line, 251 NLRB 1083 (1980), enfd 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning upon the employer's motivation. Under that test, the General Counsel must first

make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

¹⁴Michael Massolini put a slightly different twist on this. He asserted that Ybarra had asked to juggle the teams so that there would be less inclination for those who were "buddies" to converse about their personal lives while working. This would indicate that others may have contributed to the alleged lack of productivity.

¹⁵Lucore admitted that he may have made such statements but insisted that he could "hold his own very well."

Fluor Daniel, Inc., 304 NLRB 970 (1991). See also *T&J Trucking Co.*, 316 NLRB 771 (1995), where the Board stated that once the burden has shifted:

An employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. Furthermore, if an employer does not assert any business reason, other than the one found to be pretextual by the judge, then the employer has not shown that it would have fired the employee for a lawful, nondiscriminatory reason. [Citations omitted.]

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128 (1992), enfd 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

Respondent knew that Lucore was a union member who was engaged in organizational activity. Moreover, Lucore was terminated shortly after his role changed from mere union membership to active organizing and he was never called for further employment. However, there was no overt evidence of animus. May that animus be inferred in the circumstances of this case? Supporting such an inference are the following:

Michael Massolini had showered praise upon Lucore's skill and attitude when Grice referred to him as a union member in the May 8 meeting. At this hearing, he purported not to recall those statements. Such evidence tends to negate Massolini's subsequent claim that he had been aware of Lucore's low productivity since at least the mid point of the project. It seems unlikely that he would have spoken so highly of an employee who had been repeatedly reported to him as one who was holding up the progress of the project. It also appears that he sought, in this hearing, to conceal his high regard for Lucore. As noted above, the inference of animus may be drawn from evidence of false reasons and concealment.

The timing of John Massolini's first and only visit to the site only 2 days after Grice's appearance at Respondent's office and his interest in who might have signed authorization cards, while not unlawful, clearly reveal greater concern for the union activity than Respondent was otherwise willing to admit. These lend some further support to an inference of animus as does the fact of Lucore's termination less than two weeks after the acceleration of his union activity. So, too, does the abrupt and somewhat angry nature of Michael Massolini's final conversation with Lucore.

Whether an inference of animus is warranted under these facts is a close and difficult question. Considering all of the

above, I am constrained to conclude that the General Counsel has sustained his burden of proving animus, albeit by a very slender margin, and has made out a prima facie case. The burden thus shifts to Respondent to rebut that prima facie case and demonstrate that Lucore would have suffered the same fate even absent his union activity.

Counterbalancing the General Counsel's evidence is evidence that Respondent hired Lucore with knowledge of his union membership and maintained a neutral attitude, at least outwardly, toward organizing activities at its jobsites. And, while his praise of Lucore tends (if sincerely offered) to negate evidence that Massolini considered Lucore to be a slow worker, the credible evidence offered through Duvall, Moyers, and Ybarra establishes that Lucore was, in fact, slower than the others. It also establishes that they had complained to Michael Massolini about this. Even Lucore acknowledged hearing rumors that Ybarra, Moyers, and Duvall had complained about him to others.¹⁶

Michael Massolini demonstrated a somewhat volatile and voluble temperament in this proceeding. Based upon my observations of him, I am inclined to believe that his statements to Grice with respect to Lucore may have been less than sincere, perhaps as an attempt to appear open minded about a known union member. His abrupt comments in the terminal conversation with Lucore reflect impatience and discomfort at having his decision questioned. They suggest but do not establish a hidden motivation.

Lucore was laid off in the usual course of business, as the over-budget Churchville job wound down to the point where it could be handled by fewer, but more senior, employees. He was not the first employee to leave that jobsite; Parette, it appears, had already left. I, therefore, conclude that was no discrimination in his layoff. Thus, the timing of his layoff

cannot support the inference of animus. And, while I have found that Lucore was asked if he would go to the Ord project after Churchville, there was no express promise of that work and no evidence that when that job finally started, there was a position for him there. The Ord project did not begin immediately upon the completion of Churchville. When it did, it was staffed by the more senior employees with whom Lucore had worked at Churchville plus one other employee with greater company seniority. Even before it began, Massolini knew that Ord would be a losing proposition. He also knew that Lucore was considered to be slower than the other employees, a fact which would further raise its costs. With such knowledge, a decision to use other and more senior employees cannot be said to be unreasonable or necessarily indicative of discrimination.

Thus, while the circumstances warrant suspicion as to Respondent's motivation, I cannot find that, absent his union activity, he would have been not have been laid off or that he would have been recalled. I, therefore, find that Respondent has sustained its burden in this matter, albeit by a similarly slender margin.

Accordingly, I shall recommend that the complaint be dismissed.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

ORDER

The complaint is dismissed.

¹⁶Michael Massolini's instruction to Ybarra to hold off on terminating Lucore, when Ybarra first asked (after May 10) if he should do so, may indicate either a desire to avoid an charge or a desire to avoid discrimination. It adds little to this discussion.

¹⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.